Supreme Court, U.S.
FILED
JAN 13 1994
OFFICE OF THE CLERK

(2)

No. 93-993

In The

Supreme Court of the United States

October Term, 1993

MARINA VENTURES INTERNATIONALE, LTD., MARINA VENTURES, LTD., CONSTELLATION PLACE CORPORATION AND LF MARINA CORPORATION,

Petitioners,

versus

POLYTHANE SYSTEMS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

LANSFORD O. IRESON, JR.,
OF THE TEXAS BAR
711 Travis, Suite 3100
Houston, Texas 77002
(713) 216-1160

Attorney For Respondent

Of Counsel:
IRESON & WEIZEL, P.C.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

10 pp

QUESTIONS PRESENTED FOR REVIEW

1.

Should the district court, after denying petitioners' motion to dismiss for lack of personal jurisdiction, have required proof of personal jurisdiction at trial.

2.

Did the district court apply an improper standard of review for harmless error.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS THE WRIT SHOULD BE DENIED 2

1. The District Court Properly Ruled Upon Petitioners' Motion To Dismiss For Lack of Personal Jurisdiction In A Pretrial Hearing 2

2. The District Court Applied the Proper Standard Of Review For Harmless Error 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES:

Amatucci v. Delaware and Hudson Railway Co., 745 F.2d 180 (2nd Cir. 1984) 4

Ball v. Metallurigie Hoboken-Overpelt, S.A., 902 F.2d 194 (2nd Cir. 1990) 2

Boit v. Gar-Tec Products, 967 F.2d 671 (1st Cir. 1992) 2

Federal Deposit Insurance Corp. v. Oaklawn Apartments, 959 F.2d 170 (10th Cir. 1992) 3

Guilbranson v. Duluth, Missabe and Iron Range Railway Co., 931 F.2d 139 (8th Cir. 1990) 4

Habacker v. Copperloy Corp., 893 F.2d 49 (3rd Cir. 1990) 4

Jones v. Petty-Ray Geophysical Geosource, Inc., 954 F.2d 1061 (5th Cir.), *cert. denied*, ___ U.S. ___ 113 S. Ct. 193, 121 L. Ed. 136 (1992) 2

Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985) 4

Polythane Systems, Inc. v. Marina Ventures International, Ltd. and Marina Ventures, Ltd., 993 F.2d 1201 (5th Cir. 1993) 4

Robbins v. Whelan, 653 F.2d 47 (1st Cir. 1981) 4

Serras v. First Tennessee Bank, N.A., 875 F.2d 1212 (6th Cir. 1989) 3

The United States v. One Parcel of Real Estate, 963 F.2d 1496 (11th Cir. 1992) 4

United States v. Hitt, 981 F.2d 422 (9th Cir. 1992) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Scott, 678 F.2d 606 (5th Cir.) *cert. denied* 459 U.S. 972, 103 S. Ct. 304, 74 L. Ed. 2d 285 (1982) 3

Volkswagenwrk Aktiengeselishaft v. Beach Aircraft Corp., 751 F.2d 117 (2nd Cir. 1984) 2

Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1979) 4

Williams v. United States Elevator Corp., 920 F.2d 1019 (D.C. Cir. 1990) 4

No. 93-993

In The

Supreme Court of the United States

October Term, 1993

MARINA VENTURES INTERNATIONALE, LTD.,
MARINA VENTURES, LTD.,
CONSTELLATION PLACE CORPORATION AND LF
MARINA CORPORATION,

Petitioners,

versus

POLYTHANE SYSTEMS, INC.,

Respondent.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF IN OPPOSITION

Respondent, Polythane Systems, Inc., files this brief in opposition to petitioners' petition for certiorari.

REASONS THE WRIT SHOULD BE DENIED

1. The District Court Properly Ruled Upon Petitioners' Motion To Dismiss For Lack of Personal Jurisdiction In A Pretrial Hearing.

Petitioners' petition should be denied because the issues raised in the petition do not meet the requisites for review by this Court and the decision of the Fifth Circuit Court of Appeals is correct.

The Petitioners filed a motion to dismiss for lack of personal jurisdiction. [R.III, 640]. The district court held a hearing and considered memorandums, affidavits, discovery and pleadings offered by both parties. [R.II, 256, 235; R.III, 503, 544, 625]. The district court subsequently denied petitioners' motion to dismiss for lack of personal jurisdiction and issued findings of fact and conclusions of law. [R.III, 640, 642].

It was proper for the district court to rule upon petitioners' motion to dismiss at a pretrial hearing. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir.), *cert. denied*, ___ U.S. ___ 113 S. Ct. 193, 121 L. Ed. 136 (1992).

The Fifth Circuit is in harmony with other circuits and this Court, as evidenced by the very decisions cited by petitioners. *Boit v. Gar-Tec Products*, 967 F.2d 671, 674 (1st Cir. 1992) (proceedings may involve proffers of evidence by affidavits . . . depositions, answers to interrogatories. . . .); *Ball v. Metallurigie Hoboken-Overpelt, S.A.*, 902 F.2d 194 (2nd Cir. 1990); *Volkswagenwrk Aktiengeselishaft*

v. Beach Aircraft Corp., 751 F.2d 117 (2nd Cir. 1984) (confirmed rulings on motions to dismiss for lack of personal jurisdiction at pretrial hearings).

The Sixth Circuit, in *Serras v. First Tennessee Bank, N.A.*, 875 F.2d 1212-1214 (6th Cir. 1989), held the district court may determine a motion to dismiss for lack of personal jurisdiction on the basis of affidavits. The Tenth Circuit, in *Federal Deposit Insurance Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174, held a party may establish jurisdiction either at a pretrial evidentiary hearing or at trial.

Federal Rule of Civil Procedure 12(b)(2) permits a party to assert jurisdictional defenses by pretrial motion. The jurisdictional facts presented to the district court are specifically set out in the district court's findings of fact and conclusions of law [R.III, 640].

Petitioners advocate that a district court, upon denying a motion to dismiss for lack of personal jurisdiction, should also require the parties to introduce jurisdictional evidence at trial. Federal Rule of Civil Procedure 12(b)(2) and decisions of this Court do not place such a requirement upon the district courts.

2. The District Court Applied the Proper Standard Of Review For Harmless Error.

The district court's standard of review for harmless error was within the parameters of Federal Rule of Civil Procedure 61 and *United States v. Scott*, 678 F.2d 606, 612 (5th Cir.) *cert. denied* 459 U.S. 972, 103 S. Ct. 304, 74 L. Ed. 2d 285 (1982).

The Fifth Circuit held that, "Considering the record as a whole, we conclude that the erroneous omission of Dr. Kaye's report was harmless and did not affect any substantial rights of appellants." *Polythane Systems, Inc. v. Marina Ventures Internationale, Ltd. and Marina Ventures, Ltd.*, 993 F.2d 1201, 1209 (5th Cir. 1993).

The Fifth Circuit followed the standard set by the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and this Court, by reviewing an evidentiary ruling on whether or not it affected any "substantial rights" of the parties. Such test is consistent with that applied by other circuits, including those referenced by petitioners in their petition. *Williams v. United States Elevator Corp.*, 920 F.2d 1019 (D.C. Cir. 1990); *Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981); *Amatucci v. Delaware and Hudson Railway Co.*, 745 F.2d 180 (2nd Cir. 1984); *Habacker v. Copperloy Corp.*, 893 F.2d 49 (3rd Cir. 1990); *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1979); *Guilbranson v. Duluth, Missabe and Iron Range Railway Co.*, 931 F.2d 139 (8th Cir. 1990); *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985); and *The United States v. One Parcel of Real Estate*, 963 F.2d 1496 (11th Cir. 1992).

In summary, the Fifth Circuit Court of Appeals applied the proper standard of review for harmless error.

CONCLUSION

There is no reason to grant a writ of certiorari in this case, as the Fifth Circuit Court of Appeals' decision is based on settled legal principles and is not in conflict with any other circuit court of appeals.

Respectfully submitted,

LANSFORD O. IRESON, JR.
State Bar No. 10412400
711 Travis, Suite 3100
Houston, Texas 77002
Telephone: 713/216-1160
Telefax: 713/216-1161

Attorney for Respondent

Of Counsel:
IRESON & WEIZEL, P.C.